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In The

Supreme Court of the United States

October Term, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PEITIONER'S REPLY BRIEF

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CROSS-PETITIONER'S REPLY BRIEF

The purposes of this Reply Brief are to direct the Court's attention to two of its recent decisions that strongly support the Pyramid Like Tribe's Cross-Petition and to respond to the Cross-Respondents' Briefs in Opposition.

ARGUMENT

I.

The Orr Ditch proceedings resulted in a violation of procedural due process and therefore cannot be accorded finality.

Logan v. Zimmerman Brush Co., — U. S. —, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (No. 80-5950, February 24, 1982), is directly on point with respect to the constitutional inadequacy of the *Orr Ditch* proceedings. In *Logan*, a physically handicapped employee filed a complaint with a state agency charging that his employment had been terminated unlawfully. The agency inadvertently failed to convene a fact-finding conference within the statutorily prescribed period. The State Supreme Court held that the agency's failure to comply with the statutory deadline resulted in the extinguishment of the employee's cause of action.

This Court reversed, holding that the employee's cause of action is a property interest entitled to due process protection and that the employee's cause of action could not be extinguished unless he was provided an opportunity to present his claim at a meaningful time and in a meaningful manner. Since the employee was denied that opportunity as a result of the state agency's failure to act within the statutorily prescribed period, the State statute as interpreted and applied by the State Supreme Court was

held to constitute a denial of procedural due process. — U. S. at —, 102 S. Ct. 1153-59, 71 L. Ed. 2d 273-79.

The situation presented in this case is indistinguishable from *Logan* in all pertinent respects. The Tribe's cause of action for a water right for fishery purposes was not asserted or litigated by the government in the *Orr Ditch* proceedings owing to the government's conflict of interest. TCID App. A-49, A-52, A-72 to A-79, A-100, A-102, A-105 to A-106, A-107. *Logan* holds that a third party's cause of action cannot constitutionally be extinguished as a result of governmental misfeasance. *Logan* also establishes that the knowledge or lack of knowledge of the *Orr Ditch* defendants is irrelevant to the constitutional inquiry, — U. S. at —, 102 S. Ct. at 1156-57, 71 L. Ed. 2d at 276-77,[1] and that post-deprivation remedies are constitutionally inadequate, — U. S. —, 102 S. Ct. at 1158-59, 71 L. Ed. 2d at 278-79.

The second decision is *Kremer v. Chemical Construction Company*, — U. S. —, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (No. 80-6045, May 17, 1982), in which all members of the Court expressed their agreement with the principle that neither res judicata nor collateral estoppel can be applied when the party against whom the earlier decision is

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[1]The only conceivable distinction between this case and *Logan* is that the State agency's failure to convene the fact-finding conference within the statutory period was "[a]pparently inadverten[t]," — U. S. at —, 102 S. Ct. at 1152, 71 L. Ed. 2d at 271, whereas here the federal officials made a deliberate decision not to assert and litigate the Tribe's cause of action in the *Orr Ditch* case. *See* TCID App. A-2, A-10 to A-13, A-17 to A-18. But for due process purposes, it matters not whether the extinguishment of a cause of action is said to have occurred through governmental negligence, inadvertence, mistake, or deliberate and willful misconduct. The only relevant inquiry is whether "the aggrieved party [was granted] the opportunity to present his case and have its merits fairly judged." — U. S. at —, 102 S. Ct. at 1156, 71 L. Ed. 2d at 276.

asserted did not have a full and fair opportunity to litigate the claim or issue. — U. S. at — and n. 22 (majority opinion),—n. 11 (dissenting opinion), 102 S. Ct. at 1897 and n. 22 (majority opinion), 1905 n. 11 (dissenting opinion), 72 L. Ed. 2d at 280 and n. 22 (majority opinion), 290 n. 11 (dissenting opinion). *See* the Tribe's Cross-Petition at 10-11. *Kremer*, like *Logan*, *supra*, also stands for the proposition that the question of whether a full and fair opportunity was afforded depends on the process and procedures that are provided to the party against whom the preclusion defense is raised, not what the other parties to the litigation knew or did not know. — U. S. at —, 102 S. Ct. at 1897-99, 72 L. Ed. 2d at 280-82. *See* Tribe's Cross-Petition at 11-13.

The recent decisions in the *Logan* and *Kremer* cases underscore the constitutional defects in the lower courts' holding that the Tribe is precluded from litigating its claimed water right for fishery purposes against the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators. The Tribe's Cross-Petition should therefore be granted if the Court decides to review Nevada's (No. 81-2245) or TCID's (No. 81-2276) Petition.

II.

Denying the conditional Cross-Petition would not serve any useful purpose if either Petition is granted.

The Cross-Respondents' Briefs in Opposition do not dispute the Tribe's claim that the two major issues raised in its Cross-Petition are encompassed within the questions presented in the Petitions. Cross-Pet. at 9-10. The Tribe's arguments concerning procedural due process and identity of claims would therefore be part of this case whether or not the Cross-Petition is granted. The only effect of not granting the Cross-Petition, which is condi-

tional,[2] would be to limit the relief to which the Tribe otherwise would be entitled in the event it ultimately prevails on either of these theories.[3] Consequently, denying the Cross-Petition would not serve any valid purpose. In this connection it is significant to note that TCID, the user most affected by the Court of Appeals' disposition, did not file an opposition or other response to the Cross-Petition.

III.

The Tribe did not have a full and fair opportunity to litigate its cause of action for a water right for fishery purposes.

The Sierra Pacific Power Company contends that the Pyramid Lake Tribe is not entitled to due process protection in its dealings with the federal government. Br. at 7-8 & n. 4. No authority is cited to support an exemption from minimal Fifth Amendment due process constraints for the relationship between Indian tribes and the federal government.[4] Indeed, in *Morton v. Ruiz*, 415 U. S. 199,

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[2]See Sup. Ct. Rules 19.5, 20.5.

[3]Even this result may not come to pass in light of the current interlocutory posture of the litigation. *See* Washington v. Fishing Vessel Ass'n., 443 U. S. 658, 672 n. 19 (1979).

[4]The cases cited by Sierra Pacific (Br. at 7-8 n. 4) do not involve situations in which the federal government appeared in litigation in a representative capacity. They do not hold or even suggest that any such actions undertaken by governmental officials fall outside the scope of the due process clause. There is certainly no apparent reason why Indian tribes should receive less due process protection then paroled convicts, uninsured motorists, or welfare recipients. *Compare* Morrisey v. Brewer, 408 U. S. 471, 485-89 (1974); Bell v. Burson, 402 U. S. 535 (1971); Goldberg v. Kelly, 397 U. S. 254, 268-71 (1970). Unlike the facts of Link v. Wabash R. R. Co., 370 U. S. 626, 633-34 (1962), *see* Sierra Pacific Br. at 11, the government's *Orr Ditch* attorneys were not voluntarily chosen by the Tribe, were not under the Tribe's control, and were subject to the Fifth Amendment's due process constraints. *See* Public Utilities Comm'n. v. Pollack, 343 U. S. 451, 461-62 (1952).

236 (1974), and *Santa Clara Pueblo v. Martinez*, 435 U. S. 49, 70 n. 30 (1978) the Court relied on the government's "overriding duty to deal fairly with Indians" in holding that the federal government could not deprive needy Indians of welfare assistance "by what amounts to unpublished ad hoc determination" and in finding that Congress must not have intended to create a cause of action against tribal officials because tribes had not been afforded an opportunity to testify concerning that aspect of the legislation. *See also, Delaware Tribal Business Committee v. Weeks*, 430 U. S. 73, 83-85 (1977); *Stephens v. Cherokee Nation*, 174 U. S. 445, 478 (1899). Nor does Sierra Pacific offer any rebuttal to the Court of Appeals' analysis which led it to conclude that the Tribe is entitled to the protection of the Fifth Amendment's Due Process Clause. TCID App. A-42 to A-45.

Nevada's major argument on the due process issue appears to be that the Tribe was afforded due process because it could have intervened in the *Orr Ditch* case but did not attempt to do so. Br. at 2-5.[5] This was not, of

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[5]The Cross-Respondents' other arguments are without merit. There is no doubt that the due process question is "fairly included" in the question presented in the Tribe's Cross-Petition (Nevada Br. at 1-2), which asks whether the *Orr Ditch* decree can be accorded res judicata effect even though the Tribe was not a party, its claimed right was not asserted, and its nominal representative, the United States, had a disabling conflict of interest. *See* Sup. Ct. Rule 21.1. The Rule does not require the talismanic invocation of particular phrases. Procunier v. Navarette, 434 U. S. 555, 559 n. 6 (1978).

Contrary to Nevada's assertion (Br. at 2), the Court of Appeals did not decline to find that the government's representation of the Tribe's interests in *Orr Ditch* was improper or inadequate. Rather, the Court first assumed that to be the case,

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TCID App. A-46 to A-47, and then later in its opinion found that the government's conduct "was analogous to that of a faithless fiduciary" and that "the government compromised its duty of undivided loyalty to the Tribe," TCID App. A-48 to A-49, A-52. Even more to the point, the district court specifically found that the interests of the Pyramid Lake Tribe were knowingly sacrificed by the government in order to carry out the purposes of the Reclamation Act. TCID App. A-21 to A-22, A-77 to A-79, A-100, A-105. That court's determination that the government's lawyers nonetheless were not chargeable with an *"impermissible"* conflict of interest, TCID App. A-105 to A-106, was predicated on its holding that the Reclamation Act authorized the taking of Indian reserved water rights for the benefit of federal reclamation projects and that the federal officials were simply following Congress' directives. *See* TCID App. A-21 to A-22, A-73 to A-79. That holding was reversed by the Court of Appeals, TCID A-21 to A-29, and is not challenged in the Petitions for Certiorari.

Sierra Pacific's characterization of the 1975 judgment of the Indian Claims Commission (Br. at 16) is inaccurate and misleading. The award of damages to the Tribe "did not represent compensation for 'the loss, diminution, or taking of any water rights.'" TCID App. A-16.

Although the defendants attempted to prove at trial that recognition of the Tribe's fishery water right would have catastrophic consequences, that claim was inconsistent with their equally vehement contention that the fishery was thriving and did not need any additional water. In any event, the unsupported and exaggerated claims of total devastation urged by Reno et al. (Br. at 6) are certainly a far cry from the district court's finding that the United States and the Tribe did not meet their burden of proving that *no one* would sustain *any* harm. TCID App. A-107. They are also belied by the wasteful practices that are prevalent throughout the case area including the unmetered, flat rate water supply and distribution system in Reno and Sparks which results in "lavish" per capita consumption. NRS § 704.230; Tribe's Brief in Opposition at 3-8, 17-19. Reno et al. have no cause for concern in any event because their rights enjoy priorities senior to those of the Newlands Project and would not be affected unless and until TCID's diversions are entirely eliminated, an extremely unlikely and remote possibility. *See* Tribe's Brief in Opposition at 1-3, 19-20. Of course, the question of how much, if any, additional water is required to fulfill the Tribe's reserved water right for fishery purposes remains to be determined on remand. TCID App. A-59.

course, the basis of the Court of Appeals' decision which was predicated on the defendants' lack of knowledge of the inadequacy or impropriety of the government's representation of the Tribe's interests. TCID App. A-45 to A-47, A-68.[6]

Nevada does not cite to any decision holding or even suggesting that non-parties with full knowledge of the proceedings who fail to intervene in a case nevertheless can be bound by the resulting judgment.[7] We do not know of any such authority. *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S. 100, 108-12 (1969), and *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 115 (1918), hold

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[6]Sierra Pacific is not correct in stating (Br. at 10 n. 10) that this finding was not challenged. The issue of whether it is clearly erroneous was raised in the Tribe's Petition for Rehearing.

[7]There may be some confusion about the knowledge that can be attributed to the Tribe. *See* Nevada's Brief at 3-5, 1a-5a. There is no doubt, however that the Tribe was never provided or personally served with constitutionally sufficient notice that its fishery water right was placed at issue and in jeopardy by *Orr Ditch* pleadings. *See* Schroeder v. City of New York, 371 U. S. 208, 214 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950).

Members of the Tribe may have had some awareness that their water rights for irrigation purposes were involved in *Orr Ditch*, but it is neither reasonable nor fair to impose a mandatory obligation on the Tribe to infer that its fishery water right was necessarily placed at issue when the Justice Department attorneys responsible for the litigation had reached the opposite conclusion. TCID App. A-11 to A-13. Indeed, the Indians were expressly assured by the Commissioner of Reclamation in 1925 that his Bureau would "carefully guard against taking any action that would impair the right of the Indians" to water for fishing. *Id.*

In addition, we note that all references to the Tribe's alleged notice of the *Orr Ditch* litigation occurred long after the trial was completed in 1921. *See* TCID App. A-9. Even properly served notice received after that time would not have satisfied the constitutional requirement that the opportunity to be heard must "be granted at a meaningful time." *See* Cross-Pet. at 11; TCID App. A-13.

that such potential intervenors are not bound. *See also, Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U. S. 102, 110, 114 (1968).[8]

The Tribe is not, of course, an ordinary potential intervenor. It is "in a state of dependency," *United States v. Rickert,* 188 U. S. 432, 442-43 (1903), "dependent [on the United States] for [its] political rights," *United States v. Kagama,* 118 U. S. 375, 383-84 (1886), and for "protection against the selfishness of others and [its] own improvidence," *Board of County Commissioners v. Seber,* 318 U. S. 705, 715 (1943). As the Court stated just two years prior to the initiation of the *Orr Ditch* litigation in *Tiger v. Western Investment Co.,* 221 U. S. 286, 310 (1911):

> We must remember . . . that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such.

See also, Oneida Indian Nation v. County of Oneida, 414 U. S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F. 2d 370 (1st Cir. 1975). Thus, even if there were circumstances under which fully competent, would-be intervenors could be foreclosed from litigating a claim or issue adjudicated in a prior case, such a rule could not be applied to Indian tribes owing to their dependent status and "presumed helplessness."[9] *Cf. Ewert v. Bluejacket,* 259 U. S. 129, 138 (1922).[10]

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[8] Although the district court found that the Tribe could have intervened, it did not discuss the legal consequences of that finding, nor did it cite any authorities upholding the res judicata defense against would-be intervenors in general or Indian tribes in particular.

[9] Joint Tribal Council, *supra,* 528 F. 2d at 380 n. 11.

[10] The Tribe's dependent legal status coupled with the facts that it was not an *Orr Ditch* party, was not served with *Orr*

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Finally, even if res judicata could be applied to would-be intervenors who are dependent upon the United States for protection, the Tribe's sovereign immunity from suit[11] precludes it from being bound because it failed to intervene. Since tribes cannot be sued without their consent, it follows that they cannot be bound by the outcome of litigation which they are privileged to avoid, nor can they be penalized for exercising that privilege. Sovereign immunity cannot be so easily circumvented. *Santa Clara, supra*, 436 U. S. at 58-59; *United States Fidelity, supra*, 309 U. S. at 513.[12]

The Tribe has no quarrel with the principle that "*once decided*," questions affecting titles to land should no longer be considered doubtful. Br. of Reno et al. at 5-6. That rule of stare decisis or collateral estoppel has no applica-

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Ditch pleadings, and did not have the benefit of advice from any private attorneys with respect to the *Orr Ditch* litigation distinguishes its position from that of the fully competent, *Orr Ditch* defendants who were independently represented. Thus, contrary to Nevada's contention (Br. at 5-6), there is no inconsistency in contending that the *Orr Ditch* defendants are chargeable with knowledge of the government's conflict while the Tribe is not. *See, e. g.*, Smith v. Ayer, 101 U. S. 320, 326 (1880) ("[the law] considers the principal as affected with notice of all the facts, notice of which can be charged upon the attorney.")

[11]See, e. g., Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58-59 (1978); United States v. United States Fidelity & Guarantee Co., 309 U. S. 506, 512-13 (1940).

[12]Though Indian tribes are immune from suit, Congress has the authority to waive it. Santa Clara, *supra*, 436 U. S. at 58. In addition, tribes are subject to suit by the United States. *See, e. g.*, United States v. Winnebago Tribe of Indians, 542 F. 2d 1002 (8th Cir. 1976); United States v. Blackfeet Tribe, 364 F. Supp. 192, 369 F. Supp. 562 (D. Mont. 1973). *Cf.* United States v. Minnesota, 270 U. S. 181, 194-95 (1926); United States v. Texas, 143 U. S. 621, 642-46 (1892) (States are subject to suit by the United States). Thus, the parade of horribles postulated by Nevada (Br. at 8) is an illusion. *See also*, New Mexico v. Aamodt, 537 F. 2d 1102, 1106-07 (10th Cir. 1976), *cert. denied*, 429 U. S. 1121.

tion to this case, however, since the Tribe's claimed fishery water right was neither asserted nor actually decided in the *Orr Ditch* case. TCID App. A-2, A-55, A-104. Reliance on an expressly resolved claim is to be distinguished from giving undue weight to an omission that might or might not be held to be an inherent part of a party's cause of action. *See KVOS v. Associated Press*, 299 U. S. 269, 279 (1936) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") The determination as to whether claims are duplicative "is not a matter of precision nor subject to the application of any mechanical formula." *Expert Electric, Inc. v. Levine*, 554 F. 2d 1227, 1234 (2d Cir. 1977), *cert. denied*, 434 U. S. 903; *Ross v. Int'l. Broth. of Electric Workers*, 634 F. 2d 453, 458 (9th Cir. 1980).

CONCLUSION

For the reasons set forth in the Tribe's Cross-Petition and this Reply Brief, the Cross-Petition should be granted if the Court grants Nevada's (No. 81-2245) or TCID's (No. 81-2276) Petition for Certiorari.

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